

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

IN THE MATTER OF:

ALIANTE GAMING, LLC d/b/a
ALIANTE CASINO AND HOTEL,

Case 28-CA-145644

Respondent,

and

LOCAL JOINT EXECUTIVE BOARD
OF LAS VEGAS, CULINARY WORKERS
UNION, LOCAL 226 and BARTENDERS
UNION LOCAL 165 affiliated with
UNITE HERE,

Charging Party.

**RESPONDENT'S REPLY TO COUNSEL FOR THE GENERAL COUNSEL'S AND
THE UNION'S ANSWERING BRIEFS TO RESPONDENT'S EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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I. INTRODUCTION

Pursuant to Section 102.46(h) of the Board's Rules and Regulations, Respondent Aliante Gaming, LLC d/b/a Aliante Casino and Hotel (Respondent or Aliante) submits this reply to counsel for the General Counsel's (General Counsel) and Charging Party the Local Joint Executive Board's (the Union) (collectively Opposing Parties) answering briefs to Respondent's exceptions to Administrative Law Judge Gerald Michael Etchingham's October 30, 2015 decision (Decision).

II. REPLY

Opposing Parties offer no compelling arguments to rebut Aliante's exceptions to the Decision. They either ignore record evidence and Board law that contradicts their theories, or they simply parrot the judge's flawed reasoning. For the reasons discussed in Aliante's exceptions brief and below, the Board should reject Opposing Parties' arguments.

A. The Decisionmaker Did Not Have Knowledge Of Flores' Union Activity

Vice President of Human Resources Richard Danzak (Danzak) was the sole decision-maker in this case. (Tr. 186, 444, 567). The only direct evidence on the issue of his knowledge of Flores' alleged union activity is his testimony that he had no such knowledge. (Tr. 577). The judge, however, relied on a highly improbable chain of inferences to conclude that Danzak knew about Flores' union activity when he discharged her.¹ As discussed more fully in Respondent's exceptions brief (R. Br. 23-30), the judge's finding was based on a gross misreading of the record and a fundamental misapplication of the law. Opposing parties present no persuasive countervailing arguments.

¹ Specifically, the judge found that two lower level supervisors had knowledge of Flores' union activity and, due to Aliante's alleged "super vigilant" union activity monitoring program, must have "passed" that information up the chain to Danzak.

For his part, the General Counsel largely ignores the issue. Although he generally argues that the judge correctly relied on Aliante's alleged "monitoring program" to infer knowledge (GC Br. 8-9), he never squarely addresses how the alleged program led to *Danzak* (or Heath) acquiring knowledge. Instead, the General Counsel relies on vague contentions that "Respondent requested that its department managers discover who did not support the Union and to report union activity," and "supervisors reported union activity to management." (GC Br. 8). This says nothing about Danzak's (or Heath's) knowledge of Flores' alleged activity. To the contrary, the record is entirely devoid of any testimony or evidence that would establish Danzak (or Heath) had any knowledge of Flores' union activity.

The Union offers a somewhat more direct response to Aliante's argument; however, it is equally unpersuasive. According to the Union, Danzak's (and Heath's) knowledge of Flores' union activity can be inferred because the reason offered for Flores' discharge is "so baseless, unreasonable, [and] contrived as to itself raise a presumption of wrongful motive." (U. Br. 36) (quoting *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995)). This argument misses the mark.

The reasonableness of a decision, alone, is not enough to warrant a finding that the decisionmaker had knowledge of union activity. The Board in *Montgomery Ward* explained that "[t]he factors on which the Board relies when inferring knowledge do not exist in isolation" *Montgomery Ward*, 316 NLRB at 1253. Thus, merely because (at least in the judge's and the Union's minds) the reasons for Danzak's decision may have been "baseless, unreasonable, [and] contrived," that is not enough to charge Danzak with knowledge of Flores' union activities. This is especially true when the timing does not support an inference of knowledge.

In *Montgomery Ward*, two employees were discharged “within a few days” after openly soliciting co-workers to support the union. *Id.* at 1254. In this case, in contrast, at least one supervisor at Aliante “allegedly” knew about Flores’ union activity as early as August 2014. (Decision 21-22). Flores, however, was not terminated until January 26, 2015, some five months later. (GC Exh. 11). *Montgomery Ward* and other Board decisions require a much closer temporal connection in order to draw a reasonable inference that the decision-maker had knowledge of union activity. *See also State Plaza, Inc.*, 347 NLRB 755, 757 (2006) (finding timing indicative of animus where discharge decision was made “within a few day” of protected activity).

The Union next argues that Danzak’s knowledge of Flores’ union activity “is imputable to the Respondent as a matter of law” by virtue of the fact that Rosales and Sparks (whom the judge erroneously found had knowledge of Flores’ union activity) are agents of Aliante. (U. Br. 36). But agency status alone is not enough to *automatically* impute knowledge. The Board has explained that it “will not impute knowledge of union activities where the credited testimony establishes the contrary.” *Dr. Phillip Megdal, D.D.S., Inc.*, 267 NLRB 82, 82 (1983). Here, the credited evidence – from Flores herself – reveals that Danzak did *not* have knowledge of her union activity.

Flores admittedly went out of her way to conceal her union activities. She did not wear a union button. (Tr. 130, 324, 354). She never told anyone at Aliante that she signed a card. (Tr. 85, 444, 577). She conducted most of her organizing activity in the parking lot. (Tr. 325). She admitted that she had no knowledge of anyone seeing her handling Union cards. (Tr. 325). She even specifically admitted she had no knowledge that Danzak or Heath ever saw her handling Union cards. (Tr. 337-38).

For knowledge of union activity to be imputed to a decisionmaker when the decisionmaker denies having such knowledge, there has to be credited evidence to the contrary. Here, there is none.

B. Generalized Animus Is Not Enough To Prove Unlawful Motivation

The judge's reliance on Aliante's alleged generalized antiunion animus is not sufficient to establish that Flores' union activity provided the motivation for her discharge. Respondent articulated this argument in its exceptions brief (R. Br. 35), but neither of the Opposing Parties directly address it.

The General Counsel generally argues that the judge properly relied on pretext to infer employer knowledge of protected activity *and animus toward that activity*.² (GC Br. 14). But pretext alone, even assuming it exists, is not enough to establish improper motivation. *See Union-Tribune Pub. Co. v. NLRB*, 1 F.3d 486, 491 (7th Cir. 1993) ("A finding of pretext, standing alone, does not support a conclusion that a firing was improperly motivated.").

Because there is no evidence in the record that Danzak harbored antiunion animus towards Flores, the General Counsel failed to meet an essential element of the *Wright Line* standard.

C. The Decision To Discharge Flores Was Not Pretextual

The judge found that Aliante's proffered reason for discharging Flores was pretextual and, therefore, Aliante necessarily cannot establish that it would have discharged her in the absence of her union activity. (Decision 25). Aliante excepted to this finding because the judge was clearly acting as a "super-personnel department" in second-guessing Aliante's decision, as evidenced by the fact that the video did not support Flores' claim that she was "hit," and a statement was taken

² The Union does not articulate any arguments to refute Aliante's position that generalized antiunion animus is not enough.

from the only employee who actually witnessed the incident. (R. Br. 36). Opposing Parties do not meaningfully refute Aliante's position.

According to the Union, "the video evidence fully supports Flores' account of what happened to her." (U. Br. 42). This is a surprising assertion, given that Flores admittedly *did not know* what happened to her. (Tr. 303). She also admitted, upon seeing the incident on video, that the video did not show her being hit by Washburn. (Tr. 285).

The Union also claims that Heath testified "incredibly" that it did not even matter whether Flores sincerely believed that Washburn hit her. (U. Br. 43). This is not at all supported by the record. Heath acknowledged on cross-examination that Flores "may" have sincerely believed that she was struck by Washburn or the vacuum cleaner—she did not admit that Flores' belief was sincere, and she did not admit that it would not have mattered to her. Had Heath believed that Flores was being sincere, that might have impacted her analysis. But Heath did not believe that. The evidence in Heath's mind indicated that Flores was being dishonest, rather than sincere.

The General Counsel similarly attacks Heath's and Danzak's impressions of the video, going so far as to claim they are a "fabrication." (GC Br. 6). According to the General Counsel, the substance of the video itself demonstrates Flores' clear physical reaction during the incident. (GC Br. 6). But Flores' clear reaction was not enough to persuade the decision-maker that she was being untruthful. What was persuasive was the apparent absence of any contact by Washburn or the vacuum cleaner, as subsequently confirmed by the only witness to the entire incident. Flores' reactions were also not indicative of somebody who was hit or in pain. Immediately after Washburn fell, Flores playfully hits him with a towel. (Tr. 532). She also told Washburn that he "almost hit" her. (Tr. 526). Flores then starts laughing about the situation. After a few minutes, Flores grabbed Washburn by the arm, punched him, and told him that he "scared" her. (Tr. 427-

38, 497). None of Flores' playful conduct, as shown on the video, creates even an inference that Washburn had touched Flores when he fell.

IV. CONCLUSION

For the reasons stated above, and in Respondent's exceptions brief, the Board should grant the exceptions and dismiss the complaint. Opposing Parties offer no persuasive arguments to contradict the conclusion that the decision-maker had a reasonable, good-faith belief that Flores was dishonest and falsified an injury report. Her claims were thoroughly investigated, and no one involved in the investigation had any knowledge that Flores was involved in union activity. The judge's findings to the contrary should not be accepted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this 8th day of February, 2016, the undersigned, an employee of Fisher & Phillips LLP, electronically filed the foregoing **RESPONDENT'S REPLY TO COUNSEL FOR THE GENERAL COUNSEL'S AND THE UNION'S ANSWERING BRIEFS TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION** via the E-Filing system on the NLRB's website and a copy was emailed to:

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